

The decedent, Darrell Edward Smith, II, died on July 10, 2001, as the result of injuries he received in a June 29, 2001 accident at work. Surviving the decedent are a minor child who was adopted by others at birth and the decedent's mother and father. The sole issue presented to Judge Benedict was to determine the heir or heirs entitled to receive the \$25,000 death benefit provided by K.S.A. 44-510b(d). In the September 13, 2002 Award, the Judge determined the decedent's mother was entitled to receive one-half, or \$12,500, and the decedent's father was entitled to receive the other half. The Judge

also approved the attorney fee request of Ms. Hayes' attorney as it related to Ms. Hayes' portion of the benefits.

Ms. Hayes contends Judge Benedict erred. Ms. Hayes argues the Award is extremely inequitable as she should receive more than the decedent's father, who neither filed a separate claim nor participated in this claim for workers compensation benefits. Additionally, Ms. Hayes argues K.S.A. 60-1904 and K.S.A. 60-1905 give the Judge (and this Board) the authority to apportion the death benefits among the decedent's heirs after allowing for costs and reasonable attorney fees.

Despite acknowledging that adoption does not sever a child's right to inherit from the birth parents, Ms. Hayes argues the decedent's child should not be considered a legal heir under K.S.A. 44-510b(d) because a child who is adopted by others is specifically excluded from the Workers Compensation Act's definition of "wholly dependent child or children."<sup>1</sup>

Accordingly, Ms. Hayes requests the Board to modify the September 13, 2002 Award and apportion the \$25,000 of death benefits between her and the decedent's father, Darrell E. Smith, Sr. In addition, Ms. Hayes requests that attorney fees and litigation expenses be "deducted pro-rata from the share/recovery accorded each heir under the apportionment determined"<sup>2</sup> and that the funeral expenses exceeding the \$5,000 allotted by the Act also be paid proportionately from the \$25,000 of death benefits. In the alternative, Ms. Hayes requests the Board to deny decedent's father from recovering any benefits as he did not file any written claim for benefits and, therefore, she is the only person who has a valid claim to those benefits.

Respondent and its insurance carrier neither contest nor support Ms. Hayes' arguments as they believe these issues do not affect their liability.

The only issue before the Board is who should receive the death benefits provided by K.S.A. 44-510b(d).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing and considering the entire record, the Board concludes that this claim should be remanded to the Judge with directions to have a guardian *ad litem* appointed to represent the decedent's child, to give the decedent's father notice of all

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<sup>1</sup> K.S.A. 44-508(c)(3).

<sup>2</sup> Hayes Brief at 13 (filed Oct. 22, 2002).

proceedings and orders, to provide an opportunity for decedent's parents and child to present evidence and argument in support of their positions, and then to determine all of the issues that may arise, including who should receive the \$25,000 death benefit provided by K.S.A. 44-510b(d).

When a worker dies as the result of a work-related accident and leaves no dependents, the Workers Compensation Act provides a \$25,000 death benefit to be paid to the worker's legal heirs. K.S.A. 44-510b(d) provides:

If an employee does not leave any dependents, either wholly or partially dependent upon the employee, a lump-sum payment of \$25,000 shall be made **to the legal heirs of such employee in accordance with Kansas law**. However under no circumstances shall such payment escheat to the state. Notwithstanding the provisions of this subsection, no such payment shall be required if the employer has procured a life insurance policy, with beneficiaries designated by the employee, providing coverage in an amount not less than \$18,500. (Emphasis added.)

Adoption does not terminate the right of an adopted child to inherit from the birth parents. See K.S.A. 59-2118. Consequently, the decedent's child also may have a legitimate claim to the death benefits payable under the Act. As that child is a minor, a guardian *ad litem* should be appointed to represent the child's interests in these proceedings.

Further, as these proceedings affect the potential recovery of decedent's father, it is appropriate that he be notified of future proceedings and the orders entered in this claim. Unless the father advises otherwise, notice should be mailed to the address provided in the father's November 18, 2002 letter to Ms. Hayes' attorney, a copy of which was forwarded to the Judge.

### **AWARD**

**WHEREFORE**, the September 13, 2002 Award is set aside and the claim is remanded to the Judge to have a guardian *ad litem* appointed for decedent's minor child, with notice of all proceedings and orders provided to decedent's parents, and to determine all of the issues that may arise, including the proper recipient(s) of the death benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2003.

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BOARD MEMBER

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c: Darrell E. Smith, Sr., 2376 Langdon Farm Road, Cincinnati, OH 45237  
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